

No. 18-1201

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

CIRCUS CIRCUS CASINOS, INC.
d/b/a CIRCUS CIRCUS LAS VEGAS,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

ON PETITION FOR REVIEW FROM THE DECISION AND ORDER OF THE
NATIONAL LABOR RELATIONS BOARD IN CASE NUMBER 28-CA-120975

PETITIONER'S FINAL REPLY BRIEF

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STATUTES AND REGULATIONS

29 U.S.C. § 157:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) of [29 U.S.C. § 158(a)(3)].

29 U.S.C. § 158:

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer –

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title; ...
- (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization...

GLOSSARY

“ALJ” means administrative law judge.

“ALJD” means Administrative Law Judge Decision.

“Charging Party” and “Schramm” refer to Michael Schramm.

“Decision and Order” or the “Decision” means the National Labor Relations Board’s December 30, 2014 Decision and Order in *Circus Circus Casinos, Inc. d/b/a Circus Circus Las Vegas and Michael Schramm*, Case No. 28-CA-120975, reported at 266 NLRB No. 110.

“Final Answering Brief” means the Final Brief for the National Labor Relations Board.

“NLRA” or the “Act” means Section 8(a)(1) of the National Labor Relations Act.

“NLRB,” the “Board” or “Respondent” means Respondent National Labor Relations Board.

Unless otherwise noted, page/line transcript citations refer to the Hearing Transcript¹ from the unfair labor practice hearing which took place October 20-22, 2014. Respondent’s hearing exhibits are referred to as “RX --” and General Counsel’s hearing exhibits are referred to as “GCX --.”

¹ Petitioner will be submitting a Deferred Appendix pursuant to the Court’s briefing schedule, and will submit a brief with cites to the pages in that compendium at that time.

SUMMARY OF ARGUMENT

Circus Circus maintains a rigorous safety program to ensure facility maintenance employee safety and compliance with OSHA regulations. Michael Schramm loudly refused to participate in a routine mandatory medical screening critical to maintaining the order and safety of the workplace. This was unprecedented—Schramm was the only employee who had ever refused to take the test—and once management learned of his actions, Circus Circus was entitled to terminate Schramm. Circus Circus was only required to show that it reasonably believed that the misconduct occurred, and that its subsequent actions were consistent with its policies and practices. *Sutter E. Bay Hosps. v. NLRB*, 687 F.3d 424, 435-36 (D.C. Cir. 2012). Circus Circus carried this burden by demonstrating that the information available created a reasonable belief that Schramm refused to take a mandatory medical examination and that Circus Circus previously terminated employees who violated that same rule.

Further, the Board erroneously adopted the ALJ's finding that Schramm was threatened by Chief Engineer Rafe Cordell for engaging in protected activity prior to his termination. In doing so, the Board ignored the plain evidence that showed the alleged threat never happened at the specific meeting alleged by Schramm and Fred Tenney, or any other meeting. Instead, the Board adopted the ALJ's fatally inconsistent inferences made under the guise of credibility determinations. To be

clear, no valid percipient witness credibility determinations could justify the ALJ disregarding the testimony of six witnesses that were present at the meeting cited by Schramm and witnessed no threat. No valid credibility determinations could justify the ALJ crediting the portions of Schramm and Tenney's testimony claiming the threat occurred, while disregarding the plain inconsistencies that showed they were lying. The ALJ did not make credibility determinations; she simply ignored the actual content of the testimony. The Board, in arguing that the ALJ's decision should not be disturbed, fails to engage with these facts and advocates for a standard that would allow any factually baseless decision to be justified under the guise of percipient witness credibility determinations.

These errors were compounded by the Board's refusal to reopen the record to allow Circus Circus to submit records from its electronic record keeping system ("HotSOS") demonstrating Tenney had lied about creating a digital log memorializing the alleged threat. After Tenney specifically testified he recorded the threat into HotSOS on November 21, 2013, Circus Circus presented HotSOS records at the hearing explicitly showing that Tenney made no such entry on that date. Put simply, Circus Circus proved that Tenney lied. Rather than discredit Tenney as a witness, the ALJ proceeded to ignore the unambiguous portion of his testimony regarding the date of the alleged threat, finding without any grounds that he was mistaken about the date of his HotSOS entry. Once Circus Circus received the ALJ's

decision, it promptly investigated whether Tenney documented a threat for the entire month of November, requiring a review of over 12,000 pages of records. In fact, these records showed that Tenney *never* made a digital entry of the alleged threat. The Board improperly refused to reopen the record for supplementation of this evidence. *Point Park Univ. v. NLRB*, 457 F.3d 42, 51-52 (D.C. Cir. 2006) (Board must take into account contradictory evidence or evidence from which conflicting inferences could be drawn). The Board's argument seeks to continue the ALJ's pattern of turning a willfully blind eye to the mountain of evidence that rebuts Schramm's claims.

Likewise, the Board's decision that Schramm's *Weingarten* rights were violated at a December 10th investigatory meeting is unfounded. The only reasonable conclusion from the submitted evidence and testimony is that Schramm never mentioned the issue of union representation until after the meeting was over. Further, even if his alleged statement had been made prior to the meeting, his indication that he was unable to procure Union representation, without more, does not trigger *Weingarten*.

Finally, the Board's proposed remedial order for Schramm to be reinstated with "seniority" cannot be enforced because it is contrary to Board precedent and violates Section 10(e) of the Act. Schramm was a temporary employee whose job assignment would have ended with the completion of the project. The Board's

argument that analysis of Schramm's seniority is premature misses the point; requiring Circus Circus to account for his seniority at *any* stage of the proceedings exceeds the Board's authority because he had *no* seniority. The ALJ only had the authority to order Schramm to be reinstated as a temporary employee to the end of the door jam project, not to award reinstatement with any type of seniority. The Board's remedial order should be vacated.

ARGUMENT

A. The Board's Determination That Circus Circus Violated Section 8(a)(1) Of The Act By Threatening Schramm With Discharge Is Not Supported By Substantial Evidence.

The ALJ based her finding that a threat occurred on critical factual inferences that were either unsupported by the record or *directly contradicted* by the very testimony on which she relied. The Board ignores these issues and argues that the ALJ's decision is unassailable due to her reliance on witness credibility. The most glaring examples of the ALJ's errors occurred in two key areas: 1) the ALJ's reliance on Tenney's perjured testimony regarding the HotSOS entry, and 2) the ALJ's discrediting of the six witnesses specifically contradicting Schramm and Tenney.

1. Schramm And Tenney's Testimony Was Insufficient To Meet The Burden Of Proof.

First, Schramm and Tenney, the *only* witnesses who support the existence of a threat, testified unambiguously that Cordell threatened Schramm on November

21, 2013. Tenney's testimony reflects absolute certainty that the threat occurred at the last Thursday safety meeting *before* Thanksgiving, which was November 21, 2013. [JA 172] (stating "It was a Thursday safety meeting, and it was the last safety meeting before Thanksgiving," making the date November 21, 2013). He maintained this certainty under *questioning from the Administrative Law Judge*. [JA 163] (he knew it was the last weekly safety meeting before Thanksgiving); [JA 171-172] (answering the ALJ and stating that he was sure of the date because he "was there"). Likewise, Schramm claimed that Cordell threatened him on November 21 and that he believed the threat was serious. [JA 329-331; 332].

Tenney gave detailed testimony describing the HotSOS entry in which he supposedly noted, on November 21, 2013, that "[Cordell] threatened carpenter." 138:20-21. He specifically stated that he made this HotSOS entry using his Blackberry device under his user name, within the work order he created for the meeting. [JA 168-169]. However, Tenney's actual HotSOS records from November 21, 2013 prove that Tenney mentioned **no** such threat. [JA 860]. The specificity and certainty of Tenney's testimony, which was contradicted by the absence of any mention of a threat in the HotSOS records, mandates the conclusion that he lied under oath.

There is **no** factual support for the ALJ's finding that either Schramm or Tenney were mistaken about the date of the alleged threat, which the ALJ used as a

pretense to excuse Tenney's misrepresentation that he had entered the threat into HotSOS. Thus, the ALJ effectively failed to consider the evidence of Tenney's misrepresentation. A court "may not find substantial evidence merely on the basis of evidence which in and of itself justified [the agency's decision], without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn." *Point Park*, 457 F.3d at 51-52 (quotations omitted).

The Board's response fails to engage these facts, instead parroting the ALJ's credibility findings, which Circus Circus has already demonstrated were logically defective and factually unfounded. The Board's reliance on the ALJ's characterization of Schramm and Tenney as "forthright and thoughtful" as well as "non-argumentative witnesses whose demeanors evinced thoughtful reflection of each question," among other aspects of their demeanor, ignores the actual content of these witnesses' testimony set forth above. Final Answering Brief at 22 (citing Decision and Order at [JA 1069]).

Circus Circus established that Tenney unquestionably perjured himself. The Board does not, and cannot, argue that the content of Tenney's testimony was truthful, or even credible. The ALJ only reached her conclusion that Tenney was credible by hypocritically and selectively ignoring portions of the testimony, and even creating meaning in testimony that clearly did not exist. Circus Circus has shown that the ALJ's decision ignored key elements of testimony, and was thus not

based on substantial evidence. The Board ignores these issues as well, instead relying on the ALJ's statement that her credibility determinations were based "[o]n the entire record, including [her] observation of the demeanor of the witnesses." Final Answering Brief at 22 (citing Decision and Order at [JA 1066]). The ALJ's own characterization of her decision is no justification for the Board's argument that the ALJ's defective findings should not be disturbed. The Board's citation to *Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 337 (D.C. Cir. 2003) fails to include the relevant portion of the decision, which states "[d]ecisions regarding witness credibility and demeanor 'are entitled to great deference, **as long as relevant factors are considered and the resolutions are explained.**'" (emphasis added). However, the ALJ did not explain, and the Board does not address, how any characterization of demeanor could justify creating meaning in testimony (e.g., uncertainty as to the date the threat occurred) where the content of the testimony says the exact opposite. The ALJ erroneously credited Schramm and Tenney's testimony.

2. The ALJ Erroneously Disregarded All Testimony Rebutting Schramm And Tenney's Narrative.

Circus Circus presented six witnesses—Cordell, Aaron Nelson, Henry Simms, Brian Machala, Tim Cole, and Gerardo Tejada—who were present at the November 21 meeting, none of who could recall such a memorable threat occurring. The Board relies on the ALJ's finding that four of these witnesses (Tejada, Cole,

Simms, and Nelson) presented testimony “so vague” that the ALJ could not determine whether they were present at the same meeting. Final Answering Brief at 22 (citing Decision and Order at [JA 1068]). Again, the Board presents the ALJ’s findings as unassailable authority, without addressing the ALJ’s inexplicable disregard of the actual content of their testimony. Schramm testified unambiguously that he had a dialogue with Cordell about marijuana smoke at only **one** of the meetings, where the alleged threat occurred. [JA 280-284]. Each of these witnesses clearly recalled Schramm’s complaint about marijuana smoke, which, when combined with Schramm’s testimony that this only happened at one meeting, confirms that these witnesses were present.² In sum, the ALJ discredited these multiple witnesses’ consistent testimony based on uncertainty about the date of the meeting, while *crediting* Tenney’s demonstrably false testimony on this same basis.

The Board further fails to address how the ALJ could have reasonably dismissed these witnesses’ testimony for lack of specificity on the basis that “this was just another weekly safety meeting,” but for Tenney and Schramm it was “a memorable occasion.” [JA 886]. If the threat had occurred as Tenney and Schramm

² See Cole [JA 799-802] (recounting the same meeting that was described by Schramm and Tenney, but rejecting the notion that Cordell turned “red” or otherwise became upset); Tejada [JA 838-842] (discussing the meeting and Rafe’s presence); [JA 844] (denying that Cordell turned red and stating, in contradiction to Schramm, that he had “never seen him explode”); Nelson [JA 497] (describing the interchange between Schramm and Cordell and noting that Cordell never became upset).

recounted, with Cordell becoming red in the face and abruptly leaving, it would have been a drastic departure from Cordell's ordinary demeanor, and a memorable event for all involved. [JA 802] (Cordell's usual demeanor was "very smiling and happy"). The ALJ's inference and decision was "speculation without a jot of evidentiary support in the record." *Jackson Hosp. Corp. v. NLRB*, 647 F.3d 1137, 1142 (D.C. Cir. 2011).

Under established law, the General Counsel bears the burden of establishing each element of its contentions that Circus Circus violated the Act. *See, e.g., KBM Electronics, Inc.*, 218 NLRB 1352, 1359 (1975). The Board's sole argument is to remind the Court that factual findings are entitled to deference, however, that does not mean the ALJ or the Board can base violations of the Act on credibility determinations while ignoring the content of witness testimony. The Board's circular argument, that the ALJ's decision must not be disturbed based on credibility findings regardless of the content of testimony, would justify *any* mischaracterization of testimony and render the substantial evidence standard meaningless.

3. The General Counsel Did Not Carry Its Burden Of Proof To Show A Threat Occurred, And The ALJ Improperly Shifted This Burden To Circus Circus.

As Circus Circus previously set forth, the General Counsel cannot have satisfied his burden of proof with an individual who knowingly perjured himself on

a material issue, as Tenney did. The Board simply ignores the fact that after Tenney's testimony was discredited, the General Counsel let the HotSOS records which impeached Tenney go unchallenged and un rebutted.

Further, the Board cannot avoid the conclusion that the General Counsel's failure to call Andrew Saxton, who is a former employee in contact with Schramm that could have corroborated the existence of the threat if true, should result in an adverse inference. The Board's argument that Saxton was equally available to Circus Circus improperly attempts to shift the burden of proof; it is the General Counsel's responsibility to affirmatively establish the existence of the threat. *See, e.g., Precoat Metals*, 341 NLRB 1137, 1150 (2004) ("absence of corroboration is a factor, in some instances a most persuasive one, for determining whether testimony should or should not be credited.") (citing *SCA Services of Georgia*, 275 NLRB 830, 832-833 (1985)). It defies logic that the General Counsel would fail to call Saxton to the stand if he could corroborate the threat, when the only evidentiary support for the threat was Schramm's self-serving account and Tenney's perjured testimony. *See Daikichi Corp.*, 335 NLRB 622, 623 (2001) (entering adverse inference).

Finally, the Board fails to explain why the General Counsel did not recall Schramm to provide the HotSOS work order number, which Schramm claimed he still had "in his records." [JA 356-358]. If that were true, one would expect the General Counsel to recall Schramm during the hearing to provide that work order

number, and remove any doubt about the existence of the record. The General Counsel's conspicuous failure to call Schramm and Tenney to dispute the HotSOS records creates even further certainty that Tenney fabricated his testimony. Indeed, the General Counsel did not even recall Tenney to state that his HotSOS record may have been "appended to a different meeting" as suggested by the ALJ, and her finding on that point was unsupported by the record. Nonetheless, the ALJ somehow found that the General Counsel met his burden of proof with respect to the threat because Circus Circus failed to rebut testimony that the General Counsel never offered.

Finally, the Board fails to address the ALJ's reliance on the absence of HotSOS records for the entirety of November 2013, which improperly shifted the burden to Circus Circus to prove a threat did *not* occur. The ALJ shifted the burden of eliminating all possibility that the threat was made to Circus Circus, which was contrary to law. *See, e.g., KBM Electronics, Inc.*, 218 NLRB at 1359 (the General Counsel's burden to establish each element of its contention "never shifts, and ... the discrediting of any of Respondent's evidence does not, without more, constitute affirmative evidence capable of sustaining or supporting the General Counsel's obligation to prove his case."); *see also NLRB v. Joseph Antell, Inc.*, 358 F.2d 880, 882 (1st Cir. 1966) ("The mere disbelief of testimony establishes nothing").

B. The Board Misapplied *Wright Line* In Determining That Circus Circus Violated Section 8(a)(1) Of The Act By Suspending And Terminating Schramm.

The Board's two grounds for arguing Schramm's termination was based on his protected activity—temporality between the protected activity and the termination, as well as the existence of the alleged threat prior to the termination—are insufficient. Final Answering Brief at 33-34. First, the mere fact that Schramm allegedly engaged in protected activity in the month before his suspension and subsequent termination is not, on its own, sufficient. *See Neptco, Inc.*, 346 NLRB 18, 20 (2005) (“mere coincidence [in time] is not sufficient evidence of [union] animus”). The Board cites no case supporting that the timing of events present here, alone, is sufficient to show improper motivation. Final Answering Brief at 33-34. Rather, the principal case relied on by the Board recognizes that “animus” is also necessary. *Id. Inova Health Sys. v. NLRB*, 795 F.3d 68, 81 (D.C. Cir. 2015) (recognizing that “close proximity of protected conduct, expressions of animus, and disciplinary action can support an inference of improper motivation”). *NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952, 959 (2nd Cir. 1988) required the circumstances of timing to be “stunningly obvious” in order to infer animus, however, Schramm's termination arose from his own misconduct, completely unrelated to his protected activity.

The Board's only proffered evidence of animus is Cordell's alleged threat, which the General Counsel did not carry his burden to show occurred, and which the ALJ could not have properly found occurred. Indeed, the Board's assertions regarding "timing" do not rebut the fact that Schramm's complaint about marijuana smoke (and the threat, even if it had occurred) and his insubordinate refusal to take a routine mandatory medical examination have no intrinsic relation to each other. Both events arose independently in a way that neither Circus Circus nor anyone else could have predicted. *See Jackson Hosp. Corp.*, 647 F.3d at 1142 (vacating Board decision for unjustifiably inferring the existence of a conspiracy).

Even if the General Counsel had established a *prima facie* case of improper motivation, an employer nonetheless establishes good reason for a discharge under *Wright Line* if two elements are met: 1) "management reasonably believed those actions [constituting the misconduct] occurred," and 2) "the disciplinary actions taken were consistent with the company's policies and practice." *Sutter*, 687 F.3d at 435-436.³ The Board fails to adequately address Circus Circus' argument that the ALJ, in order to correctly apply *Wright Line*, was *required* to engage in this two step

³ The Board briefly suggests that Circus Circus waived its right to rely on *Sutter* because the case was not specifically referenced in the matter below. Final Answering Brief at 37. This argument is of no merit, as Circus Circus argued that the *Wright Line* standard should be applied in the case below. *Sutter* is not a separate standard from *Wright Line*, rather, it is authority from this Circuit clarifying the *Wright Line* standard with respect to an employer's burden. *Sutter*, 687 F.3d at 435-436.

analysis, yet failed to do so. *Id.* (finding ALJ's *Wright Line* analysis defective because the employer "never had the chance to meet its *Wright Line* burden [] because the ALJ declined to even examine what [management] believed, whether [its] beliefs were reasonable, and whether [its] actions based on those beliefs were consistent with [the employer's] policies and past practice"). The Board does not, and cannot, cite to any portion of the ALJ's decision engaging in the substance of this mandatory analysis. As Circus Circus argued exhaustively in its opening brief, the ALJ focused solely on Schramm's hearing testimony about "his intentions" in refusing to take the examination and what he told management in subsequent meetings. [JA 890]. The ALJ did not analyze whether the information actually available to Circus Circus gave it a reasonable basis to believe that misconduct had occurred, in direct violation of the applicable legal standard. *Sutter*, 687 F.3d at 436 (an employer may "rel[y] on reports" reflecting the employee's conduct, and "[w]hether the ALJ believes the reports are accurate or **whether [the employee] actually engaged in the [conduct] is largely immaterial to whether [the employer] reasonably believed she did**"). (emphasis added). Likewise, the ALJ did not analyze whether Circus Circus' disciplinary action was consistent with its policies and practice as required by *Sutter*. These defects are fatal to the ALJ's analysis and the Board's subsequent adoption of the ALJ's decision.

The analysis set forth above, if properly applied, clearly shows that Circus Circus had a good reason under *Wright Line* for discharging Schramm. The information available to Circus Circus created a reasonable belief that Schramm had intentionally refused to take the mandatory test. Concentra representatives, who were corroborated by Tejada and Romero, informed Beeman and Simms that Schramm flatly refused to participate in the required process, who in turn conveyed this information to Cordell. [JA 437-439; 440; 477; 260; 261]. Cordell was informed that Schramm “refused to go through the evaluation.” [JA 262]. Circus Circus had ample reason to believe that the misconduct had occurred, satisfying the first step of the required analysis under *Sutter*.⁴

Further, Circus Circus satisfied the second prong of *Sutter* by establishing that the termination was consistent with its policies and procedures. Circus Circus presented testimony showing that no one had ever refused to complete the exam in the past thirty years, which reflected the blatant and extraordinary nature of Schramm’s actions. [JA 474-476]. In the absence of identical comparators, Circus Circus presented evidence that three other employees were suspended and

⁴ Concentra’s report gave Circus Circus a reasonable belief as to Schramm’s refusal, whether its contents were true or not. However, the report was clearly accurate. Witnesses Romero and Tejada unequivocally testified that Schramm loudly refused to proceed with the examination with Concentra on December 10. [JA 829-830; 832; 848]. Further, Schramm was, **in his own words**, “hell-bent” on exempting himself from the examination. [JA 386].

terminated when they violated Rule 12 by failing to submit for a mandatory drug analysis. [JA 539-541; 716]. Circus Circus clearly carried its burden to show that its decision to suspend and terminate Schramm was consistent with its policies and practices. Circus Circus included in its opening brief Board authority noting an employer's duty to conduct medical evaluations and fit testing under OSHA regulation 29 C.F.R. § 1910.134, and upholding the employer's termination of employees who did not take the exam. *L&BF, Inc.*, 333 NLRB 268, 269-272 (2001). The Board does not address this authority, nor explain how the exact opposite result is justified in the current case. *See Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1074 (D.C. Cir. 2016) ("an unexplained divergence from [the Board's] precedent would render a Board decision arbitrary and capricious") (citing *Teamsters Local Union Nos. 822 & 592 v. NLRB*, 956 F.2d 317, 320 (D.C. Cir. 1992)).

Instead, the Board argues that Circus Circus' refusal to let Schramm see the doctor was inconsistent with a policy that gave employees the right to discuss the medical evaluation process with a doctor. Final Answering Brief at 35. In doing so, the Board attempts to divert focus to an irrelevant policy that was misapplied by the ALJ. As Circus Circus established at the hearing and explained in its opening brief, employees are required to complete the baseline evaluation *prior* to seeing the doctor, which enables the doctor to accurately assess the employee and have a meaningful conversation. [JA 416; 420-421; 231]. Schramm refused to complete

this baseline pre-examination evaluation, and was not entitled to see the doctor before doing so. The Board cites no other Circus Circus policies which are allegedly inconsistent with Schramm's termination. As Circus Circus reasonably believed Schramm had refused a required medical examination (which he did, in fact, refuse) and its actions were entirely consistent with the company's policies and practice, *Wright Line*, as applied by *Sutter* mandates a finding that Schramm's termination did not violate the Act.

The Board's remaining argument, that the termination must have been pretextual because Schramm's subsequent offers to take the test were refused, lacks merit. In fact, it was Schramm's subsequent offers to take the test that were pretextual; he never demonstrated that he was willing to participate in the process in good faith. During Circus Circus' investigation, Schramm stated that he intended, if allowed to take the test, to lie or otherwise falsify the results in order to avoid wearing a respirator mask. [JA 73; 528-533; 545]. Schramm himself conceded that he planned to do whatever it took, including intentionally failing tests, to obtain an exemption. [JA 354-355]. Circus Circus could not allow Schramm to take the test if he intended to lie. [JA 73-74]. Based on Schramm's public and demonstrative initial refusal to take the exam, and his subsequent "requests" to take and falsify the exam, it was clear that Schramm was not willing to participate in the process in good

faith. The General Counsel did not meet its burden to show the termination was a pretext under these circumstances.

The Board further relies on the ALJ's unsupported finding that Schramm did not actually state he was willing to falsify the test results. The ALJ discredited Cordell and Colin's consistent testimony supporting that Schramm did, in fact, make this statement, claiming their testimony "defies inherent probability" because it was unlikely that Schramm would defend himself by telling managers he would lie. Final Answering Brief at 39 (citing Decision and Order at [JA 1074]). The ALJ ignored Schramm's own testimony stating that he was "hell-bent" on exempting himself from the examination. [JA 386]. Even in the absence of Schramm's testimony, it was absurd for the ALJ to discredit multiple witnesses' consistent testimony on the grounds that it "defies inherent probability" that Schramm would make this statement. It also defies inherent probability that multiple witnesses would simply invent such a specific statement by Schramm.⁵ The ALJ had no proper basis to

⁵ Expanding this principle, it defies inherent probability that Cordell, known to have an even and happy demeanor, would brazenly threaten Schramm in front of a group of unionized employees. It defies inherent probability that no one else at the meeting remembered the threat if it actually occurred. It defies inherent probability that Tenney was telling the truth about having entered the threat in HotSOS if no record, at any time, ever existed. As is relevant to the *Weingarten* analysis, it defies inherent probability that Schramm's own Union steward Jerry Mong, who discussed these events with Schramm in detail after the fact, would have the understanding that Schramm had *never* asked for his representation, if Schramm had in fact done so. Yet, the ALJ had no difficulty overcoming these and other "inherent improbabilities" to reach her conclusions. The ALJ's discrediting of multiple

disregard this testimony, and her finding on this point was not based on substantial evidence. Since Circus Circus reasonably believed from Schramm's own statements that he intended to falsify the results of the exam, its reason for terminating Schramm were not pretextual.

C. The Board Erred In Adopting The ALJ's Finding That Circus Circus Violated Schramm's *Weingarten* Right.

1. The ALJ's Finding That Schramm Requested A Union Representative Prior To The December 10th Meeting Was Not Supported By Substantial Evidence.

The testimony and notes of three individuals (Mower, Colin, and Cordell) established that Schramm did not request a Union representative at the meeting, and only referred to representation after the meeting was already over, when he stated he contacted the Union but never got a response. [JA 506; 808-809; 547]. The ALJ disregarded the consistent testimony from these three witnesses in favor of Schramm's self-serving testimony that he stated, at the beginning of the meeting, that he "called the Union three times [and] nobody showed up, I'm here without representation." [JA 1064]. Remarkably, the ALJ credited Schramm's testimony on this point even while finding that he was not truthful when he later claimed that he explicitly asked for the Union to be present. [JA 354; 896]. The Board, again,

witnesses' consistent testimony indicating that Schramm said he would falsify the results of the test, on the grounds that it was not probable Schramm would make such a statement, renders percipient witness testimony essentially useless, and was arbitrary and capricious.

relies on a meritless justification by the ALJ, who found that, because Schramm claimed to be looking for union representatives before he arrived, it was “inherently reasonable that his first remarks would be about expecting a union representative to be present in response to his messages.” Final Answering Brief at 47 (citing Decision and Order at [JA 1074]). The inherent “reasonableness” of testimony is another unusable and arbitrary principle employed by the ALJ to justify baseless findings. The fact that Colin’s notes, taken contemporaneously with the meeting, do not include Schramm’s alleged reference to the union makes it inherently reasonable that this statement did not occur. The fact that Schramm’s own Union steward Jerry Mong, who discussed these events with Schramm in detail after the fact, stated his understanding that Schramm had *never* asked for his representation, makes it inherently reasonable that Schramm did not ask for representation at the meeting. [JA 791]. The ALJ’s finding that Schramm referenced union representation prior to the meeting is not supported by substantial evidence. Considering the record as a whole, the only reasonable conclusion is that Schramm did not refer to Union representation until *after* the December 10 meeting, and thus his *Weingarten* rights were not violated.

2. The ALJ's Finding That Circus Circus Violated *Weingarten* Following Schramm's Reference To The Unavailability Of Union Representation Was Contrary To Law.

The Board's argument that a *Weingarten* request need not take the explicit form of a direct request for representation is misplaced. Schramm's alleged statement, even if he is credited as having made the statement prior to the meeting, was not simply a general reference to union representation. As Circus Circus established, Schramm's alleged statement referred to a request to a representative who was unavailable. In such circumstances, it is the employee's **"obligation to request an alternative representative in order to invoke the *Weingarten* protections."** *Montgomery Ward & Company*, 273 NLRB 1226, 1227 (1984) (emphasis added) (citing *Coca-Cola Bottling Co.*, 227 NLRB 1276 (1977)). "[T]here is nothing in the Supreme Court's opinion in *Weingarten* which indicates that an employer must postpone interviews with its employees because a particular union representative, here the shop steward, is unavailable either for personal or other reasons for which the employer is not responsible." *Coca-Cola*, 227 NLRB at 1276-1277. The right to conduct such interviews "without delay is a legitimate employer prerogative." *Id.* at 1276. None of the cases cited by the Board concern the specific situation before the Court, where reference is made to an unavailable union representative, without any further statement that would qualify as a

Weingarten request. Final Answering Brief at 47-48. The Board's adoption of the ALJ's finding of a *Weingarten* violation was contrary to law.

D. The Board Erred In Denying Circus Circus' Request To Reopen The Record To Submit Evidence Conclusively Showing That Tenney, The Only Witness Who Corroborated Schramm's Allegation Of A Threat, Lied Under Oath.

While the Board points out that the 12,000 pages of HotSOS records from the entire month of November 2013 were in existence at the time of the hearing, this does not render these documents "available" at the hearing. Circus Circus produced all HotSOS records from the dates relevant to the testimony presented at the hearing. Circus Circus had no reason to know that the ALJ would go outside the record, and use her own supposition and speculation to find that Tenney was actually talking about an entirely different date, until *after* the hearing.

The Board further argues that the November 2013 HotSOS records need not be considered because the ALJ stated her decision would not have changed even if the records "completely contradicted" Tenney's testimony," because she believed his testimony was "inherently credible." Final Answering Brief at 28 (citing Decision and Order at [JA 1070]). The Board's reliance on the ALJ's stated intent to ignore evidence, and to believe Tenney's words over the plain documentary evidence establishing his perjury, is of no consequence. The relevant legal standard is not whether this specific finder of fact would have reached a different result, but whether the records constituted "contradictory evidence or evidence from which

conflicting inferences could be drawn”; if so, the Board erred by refusing to reopen the record. *Point Park*, 457 F.3d at 51-52. Circus Circus has overwhelmingly established that these HotSOS records are critical to the determination of the very existence of the threat. Schramm and Tenney, the only two witnesses who testified that the threat happened, also both testified that the threat was entered into HotSOS, and that they possessed the *exact log number* of this HotSOS entry. [JA 357-358]. The alleged log number was never produced, and the HotSOS record did not exist. The Board should have granted Circus Circus’ motion to reopen the record to produce evidence which shows the alleged threat did not happen, contrary to Schramm and Tenney’s testimony.

E. The Board’s Recommended Order To Reinstate Schramm With Seniority Violates Section 10(e) Of The Act And Cannot Be Enforced.

The Board’s argument that analysis of Schramm’s seniority should be reserved for the compliance stage misstates the issue. Schramm’s seniority is not a proper inquiry for *any* stage of the proceeding because he was a temporary employee who had *no* seniority under the applicable collective bargaining agreement. *See* [JA 213](limiting hiring to 180 days); [JA 83]. The Board concedes that Schramm had no seniority as a temporary employee by arguing that if his employment had continued, “Schramm **would have** become a full-time employee with seniority rights.” Final Answering Brief at 43 (emphasis added).

Even if the Board's order is not interpreted as reinstating Schramm with seniority, the Board still exceeds its authority by requiring Circus Circus to account for Schramm's seniority when he had none. *See NLRB v. Thill, Inc.*, 980 F.2d 1137, 1142-1143 (7th Cir. 1992); *see also Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984) (orders must be "sufficiently tailored to expunge only the actual, and not merely speculative, consequences" of the identified unfair labor practice); *Two Wheel Corp.*, 218 NLRB 486, 487 (1975) (modifying ALJ remedial order because employee was a temporary employee); *compare Nelson Mfg. Co.*, 138 NLRB 883 (1962) (reinstating temporary employee to full time position because employer had specifically informed the employee that it intended to keep him on as a full time employee).

The Board's assertion that Schramm *would have* become a full-time employee is mere speculation. The ALJ had no authority to order anything beyond reinstatement as a temporary employee to the end of the door jam project, and if the project were complete, back pay through the project completion date.

CONCLUSION

For the reasons set forth above, Circus Circus' Petition to Vacate the Board's June 15, 2018 Decision and Order should be granted.

Dated this 16th day of May, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Circuit Rule 32-1, I certify that this Petitioner's Final Reply Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this Petitioner's Final Reply Brief contains **5,765** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this Petitioner's Final Reply Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Petitioner's Final Reply Brief has been prepared using Times New Roman 14-point font, a proportionately spaced typeface.

Dated this 16th day of May, 2019.

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CERTIFICATE OF SERVICE

In addition to filing this **FINAL REPLY BRIEF** in the above captioned matter via the Court's electronic filing system, we hereby certify that copies have been served this 16th day of May, 2019, by First Class Mail or email, upon:

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